

**United States Department of Labor
Employees' Compensation Appeals Board**

R.B., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 10-747
Issued: December 3, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 25, 2010 appellant filed a timely appeal from a July 21, 2009 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and a July 23, 2009 merit decision setting forth the rate of recovery of the overpayment.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decisions.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$10,958.14 overpayment of compensation because it did not deduct health benefit premiums

¹ Under the Board's *Rules of Procedure*, the 180 day time period for determining jurisdiction is computed beginning on the day following the date of the Office's decision. See 20 C.F.R. § 501.3(f)(2). As the Office's decisions were issued July 21 and 23, 2009, the 180 day computation begins on July 22 and 24, 2009, respectively. Since using January 25, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 12, 2010, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

from his compensation for the period December 26, 2004 through June 8, 2008; (2) whether he was at fault in creating the overpayment; and (3) whether the Office properly found that it would recover the overpayment by deducting \$207.69 from appellant's continuing compensation.

FACTUAL HISTORY

The Office accepted that on August 15, 1990 appellant, then a 32-year-old nuclear inspector, sustained a herniated disc at L5-S1 in the performance of duty.² The employing establishment removed him from employment as of November 22, 2004 due to his inability to perform his assigned duties due to his medical condition. The Office paid appellant compensation for disability beginning November 23, 2004.

On December 20, 2004 appellant informed the Office that his health insurance company was terminating his benefits on December 28, 2004 as he was no longer in federal employment. The Office claims examiner advised him that health benefits would be transferred to the Office. By letter dated December 22, 2004, appellant thanked the Office for assisting him with his health insurance.

The record contains benefits statements from the Office to appellant for the periods December 20, 2003 to April 1, 2004 and October 5 to 30, 2004. The statements indicated that deductions for health insurance premiums were not applicable.

In a Form CA-1049 letter dated February 3, 2005, the Office advised appellant that it was placing him on the periodic rolls effective January 23, 2005. It indicated in its letter that deductions for health benefits were "n/a" (not applicable). The form provided, "If you have optional life insurance and/or health benefits coverage, but no deduction for it is shown above, contact this office immediately. You are still responsible for these premiums."

On May 29, 2008 the Office noted that appellant's insurance carrier had not been receiving premiums. Beginning June 8, 2008, it adjusted appellant's compensation to reflect deductions for health benefit premiums. In a June 30, 2008 memorandum, the Office indicated that it had transferred in health benefits beginning December 26, 2004 but that the premiums were not deducted until June 7, 2008.

On July 21, 2008 the Office advised appellant of its preliminary determination that he received an overpayment of \$10,958.14 because it failed to deduct health benefit premiums from December 26, 2004 to June 8, 2008. It attached a worksheet calculating the amount of the overpayment created by its failure to deduct health benefit premiums using the applicable Code 542. The Office further informed appellant of its preliminary determination that he was without fault in the creation of the overpayment.

On July 28, 2008 appellant requested a prerecoupment hearing. Following a preliminary review, on October 6, 2008 the hearing representative found that the case was not in posture for

² By decision dated October 23, 2002, the Office reduced his compensation based on its finding that his actual earnings as a timekeeper effective June 15, 2001 fairly and reasonably represented his wage-earning capacity.

decision. She noted that the Office failed to inform appellant of his right to inspect and copy government records relevant to the overpayment.

On October 8, 2008 the Office reissued its preliminary determination of overpayment. Appellant requested a prerecoument hearing. On December 15, 2008 following a preliminary review the hearing representative found that the case was not in posture for a hearing based on her determination that appellant was at fault in the creation of the overpayment. The hearing representative noted that the Office had sent him a benefits statement for the period December 20, 2003 to January 24, 2004 showing no deductions for health insurance premiums. She also determined that the February 3, 2005 letter from the Office placing appellant on the periodic rolls gave him notice that it was not deducting health benefit premiums. The hearing representative instructed the Office to change its preliminary determination that he was without fault.

On January 5, 2009 the Office advised appellant of its preliminary determination that he was at fault in the creation of the overpayment of \$10,958.14 due to its failure to deduct health benefit premiums for the period December 26, 2004 through June 7, 2008. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoument hearing.

On January 27, 2009 appellant requested a prerecoument hearing on the fact of overpayment, the amount and the fault finding. At the hearing, held on May 13, 2009, he noted that he was confused by Office paperwork and consequently hired an attorney. Appellant did not know that there was a problem with his compensation as he did not look at the checks.

By letter dated May 15, 2009, appellant's attorney cited *Ian Manson Graham*,³ for the proposition that a blank space next to deductions for health benefits on a Form CA-1049 was insufficient to place a claimant on notice that the Office was not deducting health benefit premiums.

Appellant submitted a completed overpayment recovery questionnaire on June 16, 2009. He listed his monthly expenses as \$3,816.50 and his monthly income as \$2,597.00.

By decision dated July 21, 2009, the hearing representative finalized the determination that appellant received an overpayment of \$10,958.14 because the Office did not deduct premiums for health insurance from December 26, 2004 to June 7, 2008. He further determined that appellant was at fault in the creation of the overpayment as he should have known that premiums were not being deducted for health benefits based on the February 3, 2005 letter from the Office. The hearing representative noted that his monthly expenses exceeded his monthly income by approximately \$1,000.00 and that evaluating whether the expenses were ordinary and necessary would not lower the amount to the point where income exceeded expenses. He completed a worksheet to determine the amount that would need to be repaid each month to prevent compromise of the debt. The hearing representative concluded that, based on the

³ 40 ECAB 1103 (1989).

worksheet, the Office should recover the overpayment by deducting \$207.69 from continuing compensation payments.

In a decision dated July 23, 2009, the Office informed appellant that it would recover the overpayment by deducting \$207.69 per month from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits (FEHB) program. The regulations of the Office of Personnel Management (OPM), which administers the FEHB program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides:

“An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness to the United States in the amount of the proper employee withholding required for that pay period.”⁴

In addition, 5 C.F.R. § 890.502(c) provides:

“An agency that withholds less than or none of the proper health benefits contributions for an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”⁵

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁶ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁷ The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.⁸

⁴ 5 C.F.R. § 890.502(a)(1).

⁵ *Id.* at § 890.502(c).

⁶ *Id.* at § 890.502(b)(1).

⁷ *Id.* at § 890.502(d).

⁸ *James Lloyd Otte*, 48 ECAB 334 (1997).

ANALYSIS -- ISSUE 1

The Office paid appellant compensation for total disability beginning November 23, 2004. It transferred his health benefits insurance enrollment to the Office effective December 26, 2004. The Office, however, failed to deduct premiums from his compensation payments from December 26, 2004 through June 8, 2008. Consequently, he received an overpayment of compensation. The Office calculated the amount that it should have deducted for health benefits premiums using Code 452 as \$10,958.14. Appellant is responsible for the entire amount of health benefit premiums not deducted from his compensation benefits.⁹ The Office properly determined that he received an overpayment of \$10,958.14 for the period December 26, 2004 through June 8, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹⁰ provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations¹¹ provide that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

Section 10.433(b) of the Office’s regulations provide in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹²

⁹ *Id.* See also *Marie D. Sinnett*, 40 ECAB 1009 (1989) (when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.433.

¹² *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in the creation of the overpayment. It must thus establish that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.¹³ With respect to the overpayment created from December 26, 2004 through February 3, 2005, the Board finds that the Office has not established that appellant accepted a payment that he knew or should have known was incorrect. In finding that he was at fault, the Office discussed his knowledge that it had transferred his health benefits to the Office in December 2004. It further mentioned his receipt of benefit statements; however, these statements predated the period of the overpayment. The Office has not sufficiently explained what evidence put appellant on notice that he was accepting an incorrect payment of compensation from December 26, 2004 to February 3, 2005. The Board finds that, under the circumstances, the evidence is insufficient to establish that he knew or should have known that he received an incorrect payment for the period December 26, 2004 through February 3, 2005. Consequently, the case will be remanded to the Office to consider whether the overpayment created for this period should be waived.

The Board finds that appellant was at fault for the portion of the overpayment that arose from February 3, 2005 through June 8, 2008. He knew that the Office had transferred his health benefits as evidenced by his December 22, 2004 letter. By letter dated February 3, 2005, the Office advised appellant that it was placing him on the periodic rolls effective January 23, 2005. The form provided that the deductions for health benefits were “n/a.” It also advised appellant to contact the Office immediately if he had health benefits but no deductions were shown on the form and indicated that he would still be responsible for the premiums. In determining fault the Office applies a reasonable person test.¹⁴ It was not reasonable for appellant to believe that his health benefits had been transferred to the Office when it was not making any deductions for health benefit premiums. The Board notes that appellant’s attorney, citing *Graham*,¹⁵ contended that a blank space next to deductions for health benefits on a Form CA-1049 was insufficient to put a claimant on notice that the Office was not deducting health benefit premiums. In this case, however, the February 3, 2005 letter indicated that deductions for health benefits were not applicable rather than leaving the amount blank. Further, the letter further clearly stated that if the form did not provide deductions for health benefits and appellant had coverage, he must notify the Office immediately. The Board, consequently, finds that he knew or should have known that the Office improperly failed to deduct premiums for health benefits from his compensation checks from February 3, 2005 to June 8, 2008. Therefore, appellant was at fault in creating this portion of the overpayment and is not eligible for waiver.

¹³ See *A.L.*, 61 ECAB ____ (Docket No. 09-1529, issued January 13, 2010); *Tammy Craven*, 57 ECAB 689 (2006); *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁴ See *Tammy Craven*, *supra* note 13.

¹⁵ *Supra* note 3.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$10,958.14 overpayment of compensation because it did not deduct health benefit premiums from his compensation for the period December 26, 2004 through June 8, 2008. The Board further finds that he was not at fault for the overpayment that occurred from December 26, 2004 through February 3, 2005 and that, consequently, the case must be remanded to the Office to consider waiver of this portion of the overpayment. The Board finds that appellant was at fault for the creation of the overpayment from February 3, 2005 through June 8, 2008.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2009 is set aside. The decision dated July 21, 2009 is affirmed in part and set aside in part and remanded for further proceedings consistent with this opinion of the Board.

Issued: December 3, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ In view of the Board's finding that the case must be remanded for the Office to consider waiver of a portion of the overpayment, it is premature to address recovery of the overpayment.